IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 62 OF 2003.

Shri Wilson Fernandes,
c/o Hotel Sunaina,
Fatorda, Margao. ... Appellant.

Versus

1. Shri Nitin Pandurang
   Chodankar, Near Damodar
   Housing Society, Behind
   Gouri Bungalow, Aquem,
   Alto Margao.
2. State. ... Respondents.

Mr. C.A. Coutinho, Advocate for the Appellant.

Mr. P.P. Singh, Advocate for the Respondent No. 1.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent No. 2/State.

Coram : P.V. HARDAS, J.

Date : 5th April 2004.

ORAL JUDGMENT.

The appellant/original complainant, being aggrieved by the Judgment passed by the IIIrd Assistant Sessions Judge, South Goa, Margao, dated 5th May 2003, in Criminal Appeal No. 29 of 2002, allowing the appeal and acquitting the respondent/accused, for an offence punishable under Section 138 of the Negotiable Instruments Act, has filed the present Appeal.

2. The facts, in brief, as are necessary for the decision of this Appeal, are set out hereunder:-

The appellant/complainant filed Criminal Case

No. 535/N/99/F in the Court of the Judicial Magistrate, First Class, Margao, against the respondent/accused alleging therein that the accused on 4th August 1997 had obtained an amount of Rs. 5,56,000/- from the complainant with a promise to sell a flat of 100 square metres in the building known as 'Niad' at Rawalfond, Navelim, Salcete Goa. The complainant had averred that the accused had promised to deliver possession of the flat within 6 months from the date of receipt of the amount. The complainant has averred that the accused, despite the oral agreement, failed and neglected to deliver the possession of the flat within the said period of 6 months and, on the complainant contacting the accused several times, the accused had promised to deliver the possession of the flat on or before 10th June 1999. The complainant further averred that as the accused failed to deliver the possession of the flat on 10th June 1999, the complainant contacted the accused on 16th June 1999 and the accused expressed his inability to give possession of the flat and issued 6 cheques being cheque no. 9912471, dated 16th June 1999, for Rs. 1 lakh; cheque no. 9912472, dated 25th June 1999, for Rs. 50,000/-; cheque no. 9912474, dated 18th July 1999, for Rs. 56,000/-; cheque no. 9912475, dated 22nd August 1999, for Rs. 1.5 lakhs; cheque no. 9912476, dated 25th September 1999, for Rs. 1.5 lakhs and cheque no. 9912477, dated 20th October 1999, for

Rs. 50,000/-. The said cheque no. 9912477, dated 20th October 1999, for Rs. 50,000/- was returned unpaid alongwith a memorandum disclosing the remark 'account closed'. The complainant then issued a notice, on 15th November 1999, and the accused, despite receiving the notice on 18th November 1999, did not pay the complainant the value of the cheque. In the said factual backdrop, the complainant filed the complaint before the Judicial Magistrate, First Class, Margao.

3. The learned trial Court, vide Exhibit 9, explained the particulars of the offence to the accused. The particulars of the offence at Exhibit 9 states that the complainant had paid an amount of Rs. 5,56,000/-, the accused had promised to sell a flat of 100 square metres in the building known as 'Niad' and despite his promise had failed to deliver the flat within 6 months. Towards the discharge of his liability, the accused had issued a cheque bearing no. 9912477, dated 20th October 1999, for Rs. 50,000/-, which was returned unpaid on account of 'account closed'. The accused pleaded not guilty and claimed to be tried. The complainant examined himself as P.W.1, Balkur Arun Sheregar as P.W.2 and N. Srinivasan as P.W.3. The accused examined himself as D.W.1 and also his wife Sharmila as D.W.2. The learned trial Court, accepting the case of the complainant, convicted the accused for an offence

punishable under Section 138 of the Negotiable Instruments Act and sentenced the accused to undergo simple imprisonment for 2 months and directed the accused to pay compensation of Rs. 1 lakh to the complainant under Section 357(3) of the Code of Criminal Procedure or in default to undergo simple imprisonment for 2 months. On an appeal being carried to the Sessions Court by the accused, the learned IIIrd Assistant Sessions Judge, vide Judgment, dated 5th May 2003, allowed the appeal and acquitted the accused. The complainant, being aggrieved by the acquittal of the accused, has filed the present appeal against acquittal.

4. The learned appellate Court doubted in principle and in substance the contention of the complainant that he had paid an amount of Rs. 5,56,000/- to the accused for the purchase of a flat. The learned appellate Court doubted the case of the complainant for the reason that admittedly no documents had been executed towards the receipt of the said amount by the accused and the appellate Court found that no prudent person, particularly the complainant, who was a law graduate himself, would advance such a huge amount without either obtaining a written agreement or receipt in proof of payment of the amount. The learned appellate Court also found discrepancy in the testimony of the complainant in respect of the amount of Rs.

5,56,000/- in cash available with the complainant for payment to the accused. The learned appellate Court also found that from the cross-examination of the complainant, the accused had succeeded in 'bringing on record a doubt as to whether there was any debt or liability incurred by the accused towards the complainant'. The learned appellate Court also found that the accused had succeeded in bringing on record material which casts a doubt on the said transaction of 4th August 1997 in respect of the accused receiving an amount of Rs. 5,56,000/- and, thus, the claim of the complainant was not believable and, thus, the accused had been able to establish that there was no debt or liability in respect of the said amount. The appellate Court, therefore, allowed the appeal and acquitted the accused.

5. In order to appreciate the rival contentions, it is useful to refer to the evidence led by the complainant and the accused.

6. The complainant examined himself as P.W.1 and stated that he had paid an amount of Rs. 5,56,000/- to the accused on 4th August 1997 and the accused had promised to deliver a flat within 6 months. As the accused committed default in not delivering the flat as agreed, the complainant approached the accused and the

accused promised to deliver the flat by 10th June 1999. Since the accused again defaulted in delivering the flat to the complainant, the complainant contacted the accused on 16th June 1999. The accused pleaded his inability to deliver the flat and had issued 6 cheques. The cheque no. 9912477, dated 20th October 1999, for Rs. 50,000/-, on being presented to the Bank, was returned unpaid with an endorsement 'account closed'. The cheque is at Exhibit P-1 and the cheque return memo is at Exhibit P-2 (Colly). The complainant issued a notice to the accused at Exhibit P-3 (Colly), which was accepted by the accused. As the accused had failed to pay the amount to the complainant, despite receipt of the notice, the complaint was filed.

7. In the cross-examination the complainant admitted that he had waited till 30th October 1999 to present the cheque on the request of the accused. He admitted that there was no correspondence to this effect. He also admitted that the building known as 'Niad' is situated opposite the Military Camp. He has also admitted that he had gone to the accused for the purchase of the flat and when he inquired with the accused about the availability of a flat, the accused had told him that he had a flat available for sale. He further admits that he does not know in whose property the building is situated. He admits not to have

verified any documents of the said property. He further admits not to have verified the documents of the flat proposed to be sold to him by the accused. He states that the flat agreed to be sold to him was on the first floor of the building. He was unable to give the boundaries of the building. He further states that the building was under construction and the accused had told him that one flat would be reserved for him. He admits that he had not physically verified the flat proposed to be sold to him. He denied the suggestion that the accused had not constructed any building called 'Niad'. He states that he had paid Rs. 5,56,000/- in cash on 4th August 1997 in his office at Hotel Sunaina building. He admits that one Professor G.R. Mudgod was present when he had handed over the said amount to the accused. He states that he had part of the cash with him and part of the cash was withdrawn from the Bank a few days before. A question was asked in cross-examination as to how much cash he had. This question was disallowed by the Court on the ground that the accused had an opportunity to rebut the liability. Complainant has further admitted that there was no written agreement showing the payment of Rs. 5,56,000/-. He states that he had faith in the accused. He does not know whether the building known as Chodankar Residency' was constructed by the firm called 'Niad'. He does not know whether apart from the building 'Chodankar Residency'

the accused was constructing any other building. He admits not to have anything in writing asking the accused to deliver the possession of the flat. He admits that one Polly D'Souza was present at the time of the oral agreement. He admits not to have shown the payment of Rs. 5,56,000/- in the balance sheet of the Hotel. He admits that the accused had issued a receipt showing the receipt of Rs. 5,56,000/-. He has, however, stated that on 4th August 1997 the accused had not issued any receipt for the payment of Rs. 5,56,000/-, but the accused had issued receipts pertaining to all the cheques issued by him. He also admits not to have demanded a receipt from the accused towards the payment of Rs. 5,56,000/-.

8. In the further cross-examination he has admitted that he does not know who had written the name 'Wilson Fernandes' (complainant's name) on the cheque. He, however, states that the accused had brought the cheque and had given it to him. He has admitted that the wife of the accused was running his hotel for one year and seven months. An agreement had been entered into for that purpose. He has admitted that the cheques were given by the accused alongwith the receipts in the said hotel. He states that, on 16th June 1999, he had contacted the accused in the morning and the accused had come alongwith the cheques in the afternoon. He denied

the suggestion that the cheque book consisting of the cheques was lost in the hotel when the accused was assisting his wife in running the hotel. He has also denied as not true that signed cheques were kept in the hotel to enable the wife of the accused to make payments to the concerned parties as and when required. He also denied the suggestion that the complainant after obtaining the possession of the cheques had misused the same.

9. P.W.2 Balkur Arun Sheregar was, at the relevant time, attached to the Bank of India and states that the accused had an account in the Bank. He further states that the cheque bearing no. 9912477, dated 3rd October 1999, was received by the Bank for realization. Since the account holder (accused) had not maintained the minimum balance, there were periodical debts of service charges and as a result of which the account was closed on 10th August 1995. When the cheque was received for realization, the account stood closed and, hence, the cheque was returned. He states that the accused had applied for stopping payment on 17th September 1999. The money in the account of the accused was insufficient to meet the cheque. In the cross-examination he has admitted that he had not informed the accused that the Bank was closing the account.

10. P.W.3 N. Srinivasan was the Bank Manager of Canara Bank, Fatorda Branch, at the relevant time. He states that after the cheque was returned unpaid, the same was returned to the complainant on 3rd November 1999.

11. The replies given by the accused in his Statement under Section 313 of the Code of Criminal Procedure reveal that the accused has denied as false the entire case set-up by the complainant. In the Statement, the accused had stated that he would examine himself and his wife as defence witnesses and would give his statement before the Court.

12. The accused examined himself as D.W.1 and stated that since 1997 he was acquainted with the complainant as he had taken a catering contract of Tourist Hostel. He further states that the complainant was a family friend of his wife and in-laws. In January 1997 he was offered a contract by the complainant to run a hotel by name Sunaina and, accordingly, he and his wife agreed to run the hotel from 23rd May 1997. He then states about the various terms of agreement. He further states that there was one room in the hotel, which was occupied by his wife as his wife used to stay in the hotel for the entire day. His wife used to lock the said room but used to keep the keys in the drawer of

the counter. He further states that his wife was working as catering contractor in the said hotel till November 1998. Since August 1998, his wife was sick and was not going to the restaurant. His wife gave birth to a daughter on 9th October 1998. During his wife's absence, he used to occasionally go to the restaurant and used to look after the catering. In the room his wife had kept account books, cash books, pass books and other belongings. He states that on 15th November 1998 the Karnataka Police had come to the hotel and had seized the motor-car of the complainant. The Karnataka Police had thereafter come to his residence but he could not meet the police as he alongwith his wife had gone to the doctor. After about 2 to 3 days of the incident the complainant came to his house and informed him that the police had come to the hotel as the deal in respect of the sale of the motor-car had been finalized in the hotel, the police were searching for the accused and his wife. The complainant further told him not to come to the restaurant because the Karnataka Police were keeping a watch and there was a possibility of his arrest. The accused states that thereafter neither he nor his wife visited the restaurant at all. In December 1998, the complainant again came to his house and informed the accused that after a new caterer is appointed the personal belongings like catering items, documents, cheque books and pass books would be returned to the

accused and his wife. The accused states that the complainant himself began running the restaurant. The accused has stated that till today the complainant has not returned his personal belongings like cheque books etc.. In respect of the receipt at Exhibit P-1, the accused has stated that they have not been issued by him to the complainant. He has admitted his signature on the receipt at Exhibit P-1. He has admitted that the amount and the date stated in the cheque were written by him. He has, however, stated that the name 'Wilson Fernandes' was not written by him nor was the cheque handed over by him. He further states that the signed cheques bearing no name which were lying in the room have been taken possession of by the complainant. He further states that the complainant has misused the cheques so found by him by putting his own name. He has stated that he did not owe any amount to the complainant. He further states that in order to pay the Goa Tourism Development Corporation and in order to avoid the encashment of the bank guarantee, his wife had arranged an amount of Rs. 5,56,000/- and the balance amount had been arranged by him. He states that in order to repay the amount to his wife he had signed six cheques and had left the entire cheque book with her. He has further stated that the receipts/vouchers at Exhibit PW1/DEF/G Colly were written and signed by him and they are in all 33 in number. Inadvertently he had

signed on the said vouchers/receipts. He has stated that the complainant has typed his own name on the said receipts. The total amount of the said receipts is Rs. 5,56,000/-, which matches with the amount of the six cheques. He has also stated that he was constructing a building known as 'Chodankar Residency' and in the said building there was no flat admeasuring 100 square metres and in December 1998 he got the occupancy certificate from the Village Panchayat. He has further stated that in respect of the sale of the various flats he has always entered into a written agreement and there is no question of oral agreement with anyone.

13. In the cross-examination he has admitted that he had received a notice from the Government to pay dues worth Rs. 7,75,000/- or else his contract would be terminated. He has also admitted that from 1994 he was operating the catering of the Tourist Hostel of the Government. He has stated that he does not know whether his brother-in-law Pradeep Naik, who has constructed a building next to Hotel Sunaina, was a good friend of the complainant. He has admitted that from 23rd May 1997 till 31st December 1998 his wife was looking after the management of Raj Restaurant and was sick from August 1998. He has denied the suggestion that no room was given by the management to his wife. He has further admitted in the cross-examination that in the absence of

his wife particularly during her sickness he used to supervise and manage the waiters. He denied the suggestion that after settlement of the account, he had delivered possession of the restaurant and while delivering the possession, personal belongings had been removed by his wife. He has also admitted that he had not filed any complaint before the police when the cheques were misplaced. He has also admitted that he had not sent a letter to the Bank nor filed any case for the refund of the said security deposit. He has admitted not to have issued any notice to the complainant prior to the filing of the complaint. He has admitted that since 1997-98 he has not been operating the account in the Bank of India, Margao Branch and was not aware that the Bank of India had stopped the operation of the account. He states that he even does not remotely remember as to when he last operated the account in the said Bank. He denied the suggestion that he was fully aware that the savings bank account had been stopped by the Bank. He has admitted to have issued a letter to the Bank issuing 'stop payment' instructions but had not checked whether there was sufficient funds in his account. He has admitted that he has a construction firm named 'Ninad' and, since December 1997, he is in the construction business.

14. The accused examined his wife Sharmila as

D.W.2. Sharmila states that the complainant was her family friend and had taken the catering contract in the restaurant of the Hotel Sunaina. She states that she could not fulfil the contract and left in November 1998 as she was in the family way and was expecting the delivery of the child. She states that the complainant had come to her house and had told her about the problem of his car and had told her not to come to the hotel. She further states that she used to keep all her personal things in the office room at Hotel Sunaina and the keys were always kept at the counter of the Hotel. She also states that the accused was also looking to the catering contracts during her absence. The cheques which were kept in the locker in the room were easily accessible. The complainant after telling her not to come to the restaurant started running the restaurant himself. She states that the cheque duly signed by the accused had been given to her, which had been kept in the hotel. The said cheques had been issued to her by the accused as the accused was supposed to make payment for the amount paid by her at the time of making payment to Goa Tourism Development Corporation. In respect of the receipts/vouchers, she has stated that they were to be signed by her but inadvertently they had been signed by the accused. She has stated that the name on the receipts was blank as also the name on the cheques. In the cross-examination she has admitted to have issued

notice to the complainant for refund of the money in respect of the catering contract but not to have filed a case against the complainant. She has further admitted that she had given Rs. 5,60,000/- to the accused. She has denied the suggestion that she had borrowed the said amount from her relatives. She has admitted that this amount is reflected on various receipts at Exhibit DW1/G Colly. She has also admitted that the receipt is for Rs. 19,000/- as a receipt cannot evidence cash transaction of more than Rs. 20,000/-. She has denied the suggestion that after she had stopped the catering contract she had taken all her belongings including the cheque books etc.. She is stated not to have filed a complaint to the police in respect of her belongings lying in the room and the complainant refusing to hand over the same to her.

15. Mr. Coutinho, the learned counsel appearing on behalf of the appellant/original complainant has submitted (1) that the lower appellate Court has completely ignored the presumption available under Section 139 of the Negotiable Instruments Act. For this purpose strong reliance is placed on the Judgment of the Apex Court in **Hiten P. Dalal v. Bratindranath Banerjee,** (2001) 6 S.C.C. 16. (2) It is also urged that the defence of the accused/respondent is contradictory and as such it cannot be said that the

accused has successfully rebutted the presumption under Section 139 of the Negotiable Instruments Act. (3) It is also urged that the learned Assistant Sessions Judge did not have the necessary jurisdiction to decide the appeal and, therefore, the present appeal deserves to be allowed.

16. Mr. Singh, the learned counsel appearing on behalf of the respondent/accused has submitted:- (1) the accused has been able to rebut the presumption on the basis of the admission elicited in the cross-examination of the accused as well as in the evidence of his witness. (2) It is also submitted that the evidence of the accused tasks human credulity particularly when he advanced Rs. 5,56,000/- without obtaining a written agreement or a receipt towards the payment. (3) It is urged that the ground that the Assistant Sessions Judge has no jurisdiction to decide the appeal has not been taken in the Memo of Appeal and, therefore, the appellant cannot be permitted to urge this ground for the first time. Alternatively it is submitted that originally after the admission of the appeal, the appeal was assigned to the IIIrd Assistant Sessions Judge, Margao, Goa. The said making over of the Appeal to the IIIrd Assistant Sessions Judge by the District and Sessions Judge is dated 24th June 2002. At that time the Court of the IIIrd Assistant Sessions Judge was

presided over by the Assistant Sessions Judge, who retired soon thereafter. The appeal on some occasions was placed for necessary orders before the Additional Sessions Judge, Margao, who was in-charge of the Court of the IIIrd Assistant Sessions Judge. Thereafter it appears that the Assistant Sessions Judge, Margao, came to be appointed and posted to the Court of the IIIrd Assistant Sessions Judge, South Goa, Margao. It is submitted by Mr. Singh that an Order making over the case thereafter would be an Administrative Order to be passed by the District and Sessions Judge. Since no grievance at all was made by the present appellant before the IIIrd Assistant Sessions Judge during the hearing of the appeal and since no grievance was made about the jurisdiction of the IIIrd Assistant Sessions Judge in the present appeal, the respondent is unable to state whether there was an Administrative Order making over the case to the IIIrd Assistant Sessions Judge. Mr. Singh has further submitted that, in view of Section 381 of the Code of Criminal Procedure, it cannot be said that the Assistant Sessions Judge does not have the jurisdiction to hear the Criminal Appeal. Under Section 381 of the Code of Criminal Procedure, an appeal has to be made over for hearing to the Assistant Sessions Judge. It has also been urged that there is no material on record to suggest that by an Administrative Order the appeal has not been made over for hearing to

the Assistant Sessions Judge.

17. I propose to deal with the objection regarding the jurisdiction of the Assistant Sessions Judge to hear the appeal. Mr. Coutinho, the learned counsel appearing on behalf of the appellant/complainant, has very fairly stated that the Assistant Sessions Judge would have the jurisdiction to decide the appeal only in the event it is made over for hearing by the District and Sessions Judge. An appeal independently cannot be filed before the Assistant Sessions Judge nor can he entertain an appeal. The Assistant Sessions Judge can only decide the appeal if the same has been made over to him by the District and Sessions Judge. Undisputedly in the present appeal the ground that the Assistant Sessions Judge has no jurisdiction has not been taken by the appellant in the appeal. This ground was also not urged nor was it brought to the notice of the Assistant Sessions Judge during the hearing of the appeal. Though this ground was not taken in the appeal, the appellant sought leave of this Court to urge this ground. Undisputedly also the respondents have been taken unaware by the ground regarding jurisdiction. The Order reveals that the appeal after it was admitted was made over by the District and Sessions Judge to the IIIrd Assistant Sessions Judge, Margao. The incumbent soon thereafter retired and the Court was vacant and the case

was dealt with by the in-charge Additional Sessions Judge. The Order sheet of 29th October 2002 reveals that the Assistant Sessions Judge, Margao, was posted as the IIIrd Assistant Sessions Judge, Margao. In the absence of a properly formulated challenge on the point of jurisdiction, it cannot be presumed merely on the basis of the Order sheets which do not reveal any Administrative Order making over the appeal for hearing to the IIIrd Assistant Sessions Judge that the appeal for hearing was not assigned to the learned IIIrd Assistant Judge. Ouster of jurisdiction has to be specifically impleaded and it cannot be inferred so readily. An authority deciding the appeal has to be presumed to have jurisdiction and no proper foundation has been laid by the appellant to even infer that the appeal had not been made over to the Assistant Sessions Judge for decision by the District and Sessions Judge. Therefore, according to me, there is no force in the submission of the learned counsel for the appellant that the Assistant Sessions Judge had no jurisdiction to decide the appeal.

18. The Apex Court, in the case of Hiten P. Dalal (Supra), held that the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or

consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'.

19. The accused has set up a defence that his wife was looking after the catering of the restaurant of Hotel Sunaina. This fact is admitted by the complainant, who is the owner of Hotel Sunaina. The period during which the wife of the accused was looking after the catering of the restaurant is also admitted. It is an admitted fact that, since November 1998, the wife of the accused had stopped going to the restaurant. The accused has stated that in order to pay off the liability of the Goa Tourism Development Corporation, his wife had arranged for loan of Rs. 5,56,000/-. The accused has examined his wife, who is D.W.2 Sharmila. D.W.2 Sharmila has also supported the contention of the accused. According to the accused, in order to pay off the liability, he had signed 6 cheques and had signed various vouchers/receipts and had given them to his wife. D.W.2 Sharmila does corroborate what the accused D.W.1 has stated. No doubt, there are minor discrepancies in the evidence of these two witnesses. However, minor discrepancies which do not touch the core of the evidence of the witnesses so as to cast a doubt on the entire testimony, have to be ignored. No two witnesses in a trial can ever depose alike. Exactly

identical deposition of two witnesses would be one of the grounds for doubting the credibility of the witness. Minor variations in the evidence of the witnesses is bound to occur. The evidence of the defence witnesses need not be looked at with suspicion merely because they are defence witnesses. The defence witnesses are entitled to be judged with the same yardstick which is applied for judging the prosecution witnesses. Minor inconsistencies cannot be highlighted to jettison the evidence of otherwise truthful witnesses. In this background the Judgment of the Apex Court in **Dudh Nath Pandey v. State of U.P.,** A.I.R. 1981 S.C. 911, in paragraph 19 has stated as follows:-

> "19. Counsel for the appellant pressed hard upon us that the defence evidence establishes the alibi of the appellant. We think not. The evidence led by the appellant to show that at the relevant time, he was on duty at his usual place of work at Naini has a certain amount of plausibility but that is about all. The High Court and the Sessions Court have pointed out many a reason why that evidence cannot be accepted as true. The appellant's colleagues at the Indian Telephone Industries made a brave bid to save his life by giving evidence suggesting that he was at his desk at or about the time when the murder took place and further, that he was arrested from within the factory. We do not want to attribute motives to them merely because they were examined by the defence. Defence witnesses are entitled to equal treatment with those of the prosecution. And Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell

> lies but so do the prosecution witnesses."

20. The complainant himself in his assertion that he had paid Rs. 5,56,000/- in cash to the accused, according to me, is skating on thin ice. The complainant, who is a businessman, appears to have parted with an amount of Rs. 5,56,000/- in cash for the purchase of a flat in a building which he has not seen. He appears to have paid cash for the purchase of a flat and has not verified the documents in respect thereof. He appears not to have insisted for a written agreement nor does he appear to have insisted on the accused giving him a receipt evidencing the receipt of Rs. 5,56,000/-. The complainant also does not claim to have had close business relations with the accused in order to blindly advance a huge amount of Rs. 5,56,000/- in cash. The complainant has stated that this amount was paid in front of a witness and the oral agreement was agreed to in the presence of a witness, who have not been examined by the complainant. I am conscious that the complainant need not prove the agreement of purchase of the flat nor is the complainant required to prove the reason for advancing the amount. However, this assumes importance in view of the fact that the accused has taken the defence that the complainant has not paid him the amount. Therefore, while recording whether the accused has been successful in rebutting the presumption under Section 139 of the Negotiable Instruments Act, the

various aspects of the complainant's evidence will have to be appreciated. The version of the complainant, therefore, that he paid the amount of Rs. 5,56,000/- in cash tasks human credulity for its acceptance. Another factor which goes against the complainant is the cheques and receipts. The cheques have been signed by the accused. The dates on the 6 cheques stated by the complainant are from the period June to October 1999. In the said cheques the name of the complainant is in a different handwriting. The accused has stated that the name 'Wilson Fernandes' has not been written by him. Even, according to the complainant, the accused had come to him and delivered the cheques. There is no earthly reason to believe that the accused would not write the name of the complainant but would leave it blank while writing the amounts and the dates on the cheques. There is no reason to hold that the accused got the name 'Wilson Fernandes' written by a different person. The receipts show that the name 'Wilson Fernandes' has been typewritten. While the rest of the contents of the receipt are in the handwriting of the accused, the name of the complainant appears to have been typewritten. The defence of the accused in this regard has to be appreciated when the accused has stated that the wife, who was working as a catering contractor was in possession of various cheques and receipts signed by the accused. The said cheques were apparently towards the

discharge of the liability incurred by the accused for the payment of the dues of Goa Tourism Development Corporation. D.W.2 Sharmila has stated that the personal belongings like cheque books, etc., were in the room occupied by her in the Hotel and possession of the personal belongings had been taken by the accused. There is hardly any cross-examination worth the name to discredit what the accused and his wife D.W.2 Sharmila have stated. While appreciating the evidence of the defence witnesses, the fact of no cross-examination or ineffective cross-examination has also to be taken into consideration. In the present case, in view of the cryptic cross-examination, which is wholly ineffective to disbelieve the evidence of the defence witnesses, according to me, the accused has been able to rebut the presumption under Section 139 of the Negotiable Instruments Act by leading such evidence as to render his defence probable.

21. This is an appeal against acquittal and the view taken by the appellate Court is not a perverse view warranting any interference. The view of the appellate Court is a possible view to be taken on the basis of the evidence on record and, therefore, according to me, this appeal is sans merit and deserves to be dismissed. Accordingly, Criminal Appeal is dismissed.

(P.V. HARDAS)
JUDGE.

ed's.